A

UTAMA MERCHANT BANK BHD

v.

DATO' MOHD NADZMI MOHD SALLEH

B

HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[SUIT NOS: D4-22-1248-2000 & D4-22-1249-2000]
18 JUNE 2009

C ***BANKING:*** *Banks and banking business - Loan agreement - Loan documentation signed voluntarily by customer - Loan documentation stating that loan was made at customer's request - Allegation by customer that he did not apply for loan and therefore was not liable - Whether such allegation had any bearing on the liability of the customer - Whether any*
D *legal provision requiring valid and enforceable loans to be first applied for by customer*

CONTRACT: *Agreement - Written agreement - Written agreement clear and unambiguous - Whether evidence of oral agreement admissible - Evidence Act 1950, s. 92*
E

CONTRACT: *Collateral contract - Existence of - Allegation by defendant that representation and assurances by plaintiff's employees had concluded an oral collateral agreement co-existing with written agreement - Whether burden of proving the existence of such collateral contract on defendant -*
F *Whether inherently incredible for plaintiff's employees to have given such representations or assurances - Whether implausible for a person of such high corporate stature as the defendant to have relied on such representations or assurances - Whether defendant merely feigning ignorance on the implications of the documents signed*

G

CONTRACT: *Terms - Construction of - Entire agreement clause - Scope and nature of - Whether such clause excludes any attempt to vary a written agreement by an oral agreement or statement - Whether such clause dismisses any reference to any form of collateral warranty or*
H *representation - Whether such clause provides a complete answer to any defence of oral representations or warranties*

EVIDENCE: *Parol evidence rule - Oral agreement - Exceptions to s. 92 of Evidence Act 1950 - Exceptions to s. 92 of Evidence Act 1950*
I *not pleaded - Whether oral evidence adduced against the whole of the other evidence and circumstances of the case - Whether such oral evidence ought to be admitted*

The plaintiff sued the defendant to recover moneys due and owing on two loan facilities extended to the defendant. The defendant claimed that it was the plaintiff who sought his participation in a purported listing scheme involving two companies. The defendant alleged that the plaintiff's representatives made several representations and gave various assurances to his representative, to the effect that the defendant would not be exposed to any financial risk and that the plaintiff would absorb any liabilities arising from such scheme. The defendant claimed that relying on these representations and assurances he agreed to be used as a 'vehicle' in the listing exercises of both companies. He admitted signing the loan documents as part of that listing scheme. It was the defendant's case that the loan agreements signed between him and the plaintiff were not ordinary banking loan transactions. The defendant contended that the loan agreements should be treated in the light of those representations and assurances given by the plaintiff's representatives, which would absorb his liabilities. The defence of the defendant was essentially one of "admission and avoidance". The defendant admitted the claims of the plaintiff but sought to avoid the legal inference from such admission.

Held (allowing the plaintiff's claims with costs):

(1) There was no requirement under the law for an application to be made by the defendant before the loan agreement became valid and enforceable. The written agreement signed by the defendant stated that the loan was made at his request. The defendant was thus bound by the said terms. He could not by oral evidence contradict the written agreement which he had signed voluntarily. Whether the loans were granted at the request of the defendant or otherwise, it would have no bearing on the liability of the defendant. Furthermore, the defendant had entered into the agreements at his own free will. Even if it was true that he did not make the request, he had accepted the loan and received the benefits. He was bound by the terms that he had agreed to. (para 10)

(2) The defendant owed the burden of proving that the representations and assurances had concluded an oral collateral agreement which co-existed with the written agreements. However, when viewed objectively in the context of a banking arrangement, the representations which were allegedly made to

A the defendant by the officers of the plaintiff were inherently incredible. No bank officer would be authorized to give such representations as were allegedly given by the plaintiff's representatives. Further, it was wholly implausible that the defendant in his standing as a highly educated, experienced
B and prominent corporate figure, would have relied on such representations. The alleged representations were clearly and extravagantly unusual for the plaintiff's officers to make. The defendant ought to have known that it obviously fell right outside the plaintiff's officers' authority or scope of
C employment to make such representations. Even if the alleged representations were in fact given, the defendant should have at the very least, referred to the plaintiff's top management or board of directors for their confirmation, instead of simply relying on such representations. It would be wholly
D inconsistent with the conduct of an experienced businessman for the defendant to rely on the representations. (para 11)

(3) It defied common sense that such a prominent corporate figure as the defendant would be ignorant of what was going on in
E the listing exercise where he was a borrower. The defendant admitted that he had executed all the relevant loan documentations, the contents of all of which were within his means to understand. It was highly improbable that the defendant had naively relied on the representations and
F assurances, and made no attempt to enquire or obtain an official written commitment from the plaintiff. The defendant ought to know the binding nature of the agreements he had attested. He could not be ignorant of the nature and contents of the documents he signed. The defendant was just feigning
G ignorance on the implications of the documents that he had signed. In the circumstance such reliance by the defendant was highly improbable. (para 11)

(4) Since the terms of the agreements were clear in their intent
H and purport, s. 92 of the Evidence Act 1950 applied. Section 92 does not allow the admission of any evidence to contradict or vary written agreements, unless it falls under any of its exceptions. No such exception was pleaded. In fact, the defendant admitted in cross-examination that he understood
I the significance of signing a document to mean that he agreed to the terms and conditions set out in them. The oral

evidence adduced by the defendant and the defence witnesses were against the whole of the other evidence and the circumstances of the case. The court could not admit the oral evidence for the defendant in the light of s. 92 of the Evidence Act. *Tindok Besar Estates Sdn Bhd v. Tinjar Co* (foll); *Koh Siak Poh v. Perkayuan OKS Sdn Bhd* (foll). (para 11)

(5) The agreements between the plaintiff and the defendant contained an "Entire Agreement Clause". The legal effect of such clause is very clear. It excludes any attempt to vary a written agreement by an oral agreement or statement. It dismisses any reference to any form of collateral warranty or representation that a defendant may attempt to establish. It binds the parties that the full contracting terms are to be found solely in the documents and not elsewhere. Consequent to that term any promise or assurance made, in the course of negotiations will not have any contractual force. The Entire Agreement Clause, provides in law a complete answer to any defence of oral representations or warranties. *Entrepreneur Pub (GL) v. East Crown Ltd* (refd); *Macronet Sdn Bhd v. RHB Bank Berhad* (foll). (para 11)

(6) In the instant case, there was not a single piece of contemporaneous documentary evidence that remotely pointed to the existence of any form of oral representation from the plaintiff to the defendant. It was amply clear, that the defendant's contention that oral representations were made to him by the plaintiff's officers was highly improbable. Furthermore, the evidence adduced by and on behalf of the defendant was not admissible for reasons that it could not be admitted under s. 92 of Evidence Act. It was also not admissible due to the Entire Agreement Clause, and the evidence went against the very conduct of the defendant himself. Clearly, the defendant failed to establish the existence of any collateral agreement which co-existed with the written agreements, to absolve his liability. (para 11)

Case(s) referred to:

Armagas Ltd v. Muddogas SA [1986] 1 AC 717 ***(refd)***

Bumiputra Lloyds Leasing Bhd v. Sykt Teknomewa Sdn Bhd & Ors [1990] 2 CLJ 23; [1990] 1 CLJ (Rep) 684 HC ***(refd)***

Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC ***(refd)***

Entrepreneur Pub (GL) v. East Crown Ltd [2000] 2 Lloyd's Reports 611 ***(refd)***

A *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarlous George Fernandez & Anor & Another Case [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50 SC* ***(refd)***

Koh Siak Poh v. Perkayuan OKS Sdn Bhd [1989] 2 MLJ 194 ***(foll)***

Macronet Sdn Bhd v. RHB Bank Berhad [2002] 4 CLJ 729 HC ***(foll)***

B *Tindok Besar Estates Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229* ***(foll)***

Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh [2003] 4 CLJ 859 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92

C *For the plaintiff - Brendan Navin Siva (Habizan Rahman with him); M/s Kadir Andri & Partners*

For the defendant - Yusuf Khan (Fong Teng Fook with him); M/s Yusuf Khan & Fong

D *Reported by Andrew Christopher Simon*

JUDGMENT

Rohana Yusuf J:

E

[1] The plaintiff, Utama Merchant Bank filed two civil actions against the defendant. The claims of the plaintiff in both D4-22-1248-2000 (Suit 1248) and D1-22-1249-2000 (Suit 1249) are in respect of loan facilities granted to the defendant, in the sum of F RM12,000,000 and RM14,000,000 respectively. Both suits are heard together.

The Plaintiff's Case

[2] On the failure of the defendant, Dato' Mohd Nadzmi bin G Mohd Salleh (Dato' Mohd Nazmi) to pay the amount due and owing under both loan facilities the plaintiff issued letters of demand for the sum of RM13,548,522.75 in respect of Suit 1248 and the sum of RM14,151,205.52 in respect of Suit 1249. In respect of Suit 1249, the plaintiff exercising its rights under the H memorandum of deposit, sold the pledged shares in Besteel Engineering Works Sdn Bhd (BEW) for the sum of RM1,476,900. With that sale, it reduces the amount owing from the defendant to the plaintiff. As at 31 October 2006, the total amount due and owing by the defendant to the plaintiff in Suit 1248 is I RM22,749,622.03 together with interest at the rate of 3% per annum over the plaintiff's cost of fund from 1 November 2006 to

the date of full realization. No dispute was raised on the quantum of the plaintiff's claim. The total amount due under suit 1249 is RM21,947,555.22 together with 4% interest per annum over plaintiff's cost of fund from the same above dates.

The Defendant's Case

[3] The defendant's case is as follows. There were listing exercises involving two companies namely Besteel Engineering Works Sdn Bhd (BEW) and Soon Huat Technologies (M) Sdn Bhd (SHT) on the then Kuala Lumpur Stock Exchange (KLSE). Dato' Mohd Nadzmi (DW1) testified that, it was the plaintiff which identified him as the right, prominent and successful Bumiputra entrepreneur, who qualifies to take up 30% share equities in the two companies in order to meet one of the listing requirements. He said the plaintiff's employees Encik Mohd Sofian bin Jaafar (Encik Mohd Sofian) made various representations and assurances to his representative Encik Lamin bin Ismail (Encik Lamin). Dato' Mohd Nadzmi testified that the following representations by the plaintiff had induced him; that the plaintiff will finance the 30% purchase of the equity holdings in both companies; that all due diligent and feasibility studies including visit to the companies had been undertaken by the plaintiff thus no further studies would be required; that the repayment of the loan would be made from proceeds of listing in one bullet payment, that he is not exposed to any financial risk and the plaintiff will absorb all liabilities, the plaintiff warrants and guarantees the successful listing of both the companies, the implementation of the scheme was to be fully managed and controlled by the plaintiff. Further to that, according to the defendant the plaintiff held to have possessed the necessary skills to effect the listing exercise.

[4] Allegedly relying on these representations and assurances, the defendant agreed to be used as a vehicle in the listing exercises of both companies. He admitted signing the loan documents as part of that listing scheme. He maintained that he signed the loan documents solely because of the said representations and assurances. It is the defendant's case that the loan agreements signed between him and the plaintiff in both actions are therefore not ordinary banking loan transactions as they appear to be. The defendant contends that the loan agreement should be treated in the light of these representations and assurances given, which would absorb his liabilities.

[5] The representative of Dato' Mohd Nadzmi, Encik Lamin Bin Ismail testified as DW2. He said, at the material time he was the Financial Adviser and Consultant to the defendant particularly regarding the acquisition of Mara Holdings and other companies. His testimonies are in support of Dato' Mohd Nadzmi's evidence generally. In summary, his testimonies are these; that the plaintiff was embarking on listing exercises of the two companies and sought for the defendant to participate and to be used as a vehicle for listing. Unfortunately, the listing could not proceed and there were losses suffered. He testified that Encik Mohd Sofian and Encik Imran Busari on behalf of the bank, made the representations and gave assurance that Dato' Mohd Nazmi would be absolved from any risk or liability in the listing exercise.

[6] The evidence of both defence witnesses were denied by the plaintiff's witnesses. Both Encik Mohd Sofian and Encik Imran were then two officers of the Plaintiff. Encik Mohd Sofian was at the material time a Senior Manager in Corporate Finance Division. He testified as PW2. His evidence is that it was Encik Lamin who came to see him on behalf of the defendant. According to him Encik Lamin came forward with suggestions of the two companies to be listed. Encik Lamin was the one who proposed Dato' Mohd Nadzmi to be the bumiputra participant. He said he met Encik Lamin, whom he knows, a few times. In essence he denied making any of the alleged representation to either Encik Lamin or to Dato' Mohd Nadzmi.

The Defence

[7] It is the defence case that, though he signed all the agreements relating to the loan facilities, he did so in furtherance of the plaintiff's scheme in the listing exercise which the plaintiff promised to absolve him of any liability. The defence of the defendant is therefore one of "admission and avoidance". The defendant admits the claim of the plaintiff but seeks to avoid the legal inference from such admission, by setting out facts to counter that inference. In view of the nature of the defendant's defence, the burden lies on the defendant to prove these facts. It is for this reason that the defendant was ordered by the court in *Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh* [2003] 4 CLJ 859 to begin the case first, in the trial proceedings.

No Application Made By The Defendant

[8] In attempting to establish that the listing exercise was the sole initiative of the plaintiff, learned counsel for the defendant, Encik Yusoff Khan (Encik Fong Teng Fook with him) contended that the defendant never even applied or requested for the loans in the first place. He said the plaintiff had never tendered evidence of loan application by the defendant to the court. Encik Yusuf Khan submitted this, despite the contradiction in the written loan documentations. In the documents it is expressly stated that the loan is granted pursuant to an application and at the request of the defendant. The said clauses are found in Bundle CBDA, Preamble A of the Memorandum of Deposit, Preamble A of the Power of Attorney, Preamble A of the Supplemental Agreement, Preamble A of the Facility Agreement. He contends that despite these clauses, the loans were in fact without any request from the defendant.

[9] Learned counsel for the plaintiff Encik Brendan Siva (Encik Habizan Rahman with him) argued that whether or not there is a request for the facilities, is of no relevance or holds no significance. What matters was, according to the counsel, that the defendant did unequivocally and clearly accept the loans that were granted by the plaintiff to him. He signed and accepted the terms and conditions of the letters of offer, the Facility Agreements and all the relevant documents.

[10] I agree with Encik Brendan Siva on this point. Firstly, there is no requirement under the law for an application to be made by the defendant before the loan agreement is valid and enforceable. Secondly, the written agreement signed by the defendant states that the loan was made at his request. The defendant is bound by the said term. He cannot by oral evidence contradict the written agreement which he had signed voluntarily. I also agree with Encik Brendan Siva that whether the loans were granted at the request of the defendant or otherwise, it will have no bearing on the liability of the defendant. Furthermore, the defendant had entered into these agreements at his own free will. Even if it is true that he did not make the request, he had accepted the loan and received the benefits. He is bound by the terms that he had agreed.

A **Representations And Assurances**

[11] Coming now to the alleged representations made on behalf of the bank. There are two conflicting versions on the alleged representations. The defendant owes the burden of proving that
B the representations and assurances had concluded an oral collateral agreement which co-exist with the written agreements. It was submitted by Encik Yusoff Khan for the defendant that these representations bind the plaintiff. He contends these representations and assurances of the plaintiff had caused the defendant to readily
C accept to be used as a vehicle in the listing exercise. In establishing the existence of such a collateral agreement, the defendant is faced with an enormous task in view of the following reasons.

D **Representations Are Inherently Incredible**

[12] First, when viewed objectively in the context of a banking set up, the representations which were allegedly made to Dato' Mohd Nazmi by the officers of the plaintiff are inherently incredible. No bank officer would be authorized to give such
E representations. It is also wholly implausible that the defendant in his standing would have relied on such representations. The defendant is a known corporate figure, he is highly educated, an experienced and prominent businessman, and has held many positions as director of public listed companies. In his own
F testimonies he said the reason why he was sought after by the plaintiff is because of his standing in the corporate world and business circle. He would be well placed to understand fully, that no bank officer would conceivably have the authority to give such representations on behalf of the bank.

G **[13]** If it is true that Dato' Mohd Nadzmi relies on such representations in my mind it would be reasonable to expect him at the very least, to inquire into the unlikelihood that the officers were in fact not authorized to give such representations. This is
H particularly true when the alleged representations were clearly and extravagantly unusual for the bank officers in their positions to make. The defendant ought to know that it obviously fell right outside the bank officers' authority or scope of employment to make such representations. This issue came before the House of
I Lords in *Armagas Ltd v. Muddogas SA* [1986] 1 AC 717. In that case the House of Lords held that, even though generally an

employer can be liable for fraudulent representation that causes loss to innocent parties, such liability could not exist if it had been brought about by misguided reliance on the servant. This is especially so, when the representations were not within the class of act where an employee in his position was usually unauthorized. Thus, even if the alleged representations were in fact given, the defendant should have at the very least, referred to the plaintiff's top management or board of directors for their confirmation, instead of simply relying on such representations. It would be wholly inconsistent with the conduct of an experienced businessman for the defendant to rely on the representations. Dato' Mohd Nadzmi is not a man who is ignorant of commercial and legal matters. He is not bereft of wisdom to deal in the commercial world. He has impressive credentials; a graduate in Bachelor of Arts and Economics degree from Ohio University, a Bachelor of Science in Chemistry and Mathematics from Ohio University and Masters of Arts in Economics and Statistics from Miami University. The Defendant was a lecturer in the faculty of Economic Resources and Agri Business at Universiti Pertanian Malaysia in 1980 to 1981, a marketing executive of Petronas from 1981 to 1982, an Assistant Manager in Hicom from 1982 to 1984, a Manager in Edaran Otomobil Nasional Bhd from 1984 to 1986, an Executive Director of Edaran Otomobil Nasional Bhd from 1990 to 1992, a Deputy Managing Director of Proton from 1992 to 1993, a Managing Director of Proton from 1993 to 1996 and an Executive Chairman of Trilisco Folec Sdn Bhd from 1996 onwards. He was also Executive Chairman of MARA Holdings Bhd and director of several companies (as listed on p. 231 CBDA) and shareholder in many companies.

[14] He himself admitted that he was identified by the plaintiff on the basis that he is a prominent corporate figure and known in the commercial world. It defies common sense to accept that a person of such standing can plead ignorance on what is going on in the listing exercise where he is a borrower. Furthermore, the defendant admitted that he executed all the relevant loan documentations, including the Letters of Offer, the Facility Agreements, the Memorandum of Deposits, the Powers of Attorney and the letter of drawdown. The contents of all of them are within his means to understand, though he says that he is not bound by the terms and conditions set out in them because of the representations and the documents are mere formalities. In my view it is highly

improbable that he had naively relied on these representations and assurances, and made no attempt to enquire or obtain an official written commitment from the plaintiff.

[15] The defendant ought to know the binding nature of the agreements he had attested, he cannot be ignorant of the nature and contents of the documents he signed. James Foong J (now FCJ) in see *Chai Then Song v. Malayan United Finance Bhd* [1993] 2 CLJ 640 held that a person who chose to be careless or not bothered with the contents of documents he signs should be prevented from denying that the contents bind him. The issue raised here is also akin to a plea of *non est factum* which Zakaria Yatim J (as he then was) in *Bumiputra Lloyds Leasing Bhd v. Sykt Teknomewa Sdn Bhd & Ors* [1990] 2 CLJ 23; [1990] 1 CLJ (Rep) 684 held that an appropriate exercise of reasonable care in the circumstances, must be shown to succeed on such a plea. Far from it, the defendant is just feigning ignorance on the implications of the documents that he had signed. In the circumstance such reliance by the defendant is highly improbable.

Representations Contradict Written Agreements

[16] Secondly, the alleged representations are in contradiction to all the written agreements the defendant had signed. The defendant admitted signing the relevant agreements which in essence had culminated into a loan transaction granted by the plaintiff to him. The net effect of which shows the defendant in fact, borrowed for the purpose of purchasing 30% equities in each of the two companies proposed for listing.

[17] Since the terms of the agreements are clear in their intent and purports, s 92 of the Evidence Act 1950 comes into play. Section 92 does not allow the admission of any evidence to contradict or vary written agreements, unless it falls under any of its exceptions. No such exception is pleaded. In fact, the defendant admitted in cross-examination that he understood the significance of signing a document to mean that he agreed to the terms and conditions set out in them.

[18] The evidence of the defendant requires critical assessment when he is a witness with a purpose of his own to serve. The oral evidence adduced by the defendant and the defence witnesses are against the whole of the other evidence and the circumstances

of the case. In a situation of conflicting oral evidence, a trial judge must make reference to the objective facts and documents and the overall probabilities of the case.

[19] There are whole list of authorities that support the inadmissibility of such evidence. It is trite that documents must be construed within its four corners. This is the decision of the Federal Court in *Tindok Besar Estates Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, and the Supreme Court case of *Koh Siak Poh v. Perkayuan OKS Sdn Bhd* [1989] 2 MLJ 194, where it was held that in a clear and unambiguous document the court should not go beyond any written terms. This court cannot admit these oral testimonies in the light of s. 92 of the Evidence Act and the two above cases.

Entire Agreement Clause

[20] Thirdly, it is pertinent to note that the agreements between the plaintiff and the defendant contain the "Entire Agreement Clause". To appreciate the full effect of such a clause it would be appropriate for me to reproduce them. In respect of Suit 1248, cl. 30 of the term loan facility agreement stipulates as follows:

> **30.1 Entire Agreement**
>
> This Agreement:
>
> 30.1.1 constitutes the entire agreement and understanding between the Parties hereto with respect to the matters dealt with in this Agreement;
>
> 30.1.2 save for the Letter of Offer, supersedes any other agreement, letters, correspondence (oral or written or expressed or implied) entered into prior to this Agreement in respect of the matters dealt with in this Agreement; and
>
> 30.1.3 was not entered into by the Parties hereto in reliance of any agreement, understanding, warranty or representation of any Party hereto not expressly contained or referred to in this Agreement.

In respect of Suit 1249, section 16.17 of the Term Loan Facility Agreement stipulates as follows:

Section 16.17 Entire Agreement

(a) The terms and condition,, of the Letter of Offer shall, except to the extent of any inconsistency with the provisions of this Facility Agreement, continue to be valid and enforceable against the Borrower;

(b) Save as aforesaid, this Facility Agreement supersedes all oral negotiations and prior correspondences in respect of the subject matter hereof.

(see page 217 of CBDB)

The legal effects of such a clause is very clear. It excludes any attempt to vary a written agreement by an oral agreement or statement. It dismisses any reference to any form of collateral warranty or representation that a defendant may attempt to establish. It binds the parties that, the full contracting terms are to be found solely in the documents and not elsewhere. Consequent to that term any promise or assurance made, in the course of negotiations will not have any contractual force.

[21] The entire agreement clause in fact, provides in law a complete answer to any defence of oral representations or warranties. In *Entrepreneur Pub (GL) v. East Crown Ltd* [2000] 2 Lloyd's Reports 611, the Entire Agreement Clause is defined as a clause that constitutes a binding agreement between the parties that the full contractual terms are to be found in the documents containing in that clause and not elsewhere. Abdul Aziz Mohammad J (now FCJ) in *Macronet Sdn Bhd v. RHB Bank Berhad* [2002] 4 CLJ 729 explained that, the effect of the entire agreement clause was to exclude any variation of the written agreement by an oral agreement. Basing on this Entire Agreement Clause alone, the testimonies by the defendant become inadmissible.

Conduct Of The Defendant

[22] There is yet another dimension to the alleged collateral agreement. In commercial transactions especially, there is a substantial body of contemporaneous documentary evidence that explain the surrounding situation. In the present case, there is not a single piece of contemporaneous documentary evidence that remotely points to the existence of any form of oral representation from the plaintiff to the defendant. The defendant readily admits

that at no point in time did he issue any letter to the plaintiff to confirm that such representations were in fact given or made despite admitting that the representations were important factors that induced him to take up the loan and buy the shares. On the other hand the defendant's subsequent conduct throughout the loan period is wholly inconsistent with the conduct of a person who had purportedly been given oral representations or assurances as claimed.

[23] The following contemporaneous documentary evidence defies the contention that the defendant had indeed been induced by the plaintiff's representations. A memo of the plaintiff recording a meeting with a representative of the defendant (pp. 183 to 208 of CBD-A) shows evidence of negotiations between the plaintiff and the defendant on restructuring of the loan and repayment of the amount outstanding, after the listing of the two companies had failed to materialise. There is a minutes of meeting of 15 January 1999 (pp. 183-184 CBDA) attended by Encik Lamin bin Ismail on behalf of the defendant to update the plaintiff on the defendant's plan to unwind his position. It was disclosed in this meeting that there was an interested party from Singapore wanting to acquire the defendant's stake in BEW for RM8,000,000. The defendant was also considering other options to ensure the eventual listing of BEW by injecting more contracts into BEW to improve the listing and earning potential. There was also a proposal for a reverse take over of Paragon Bhd by SHT and for the defendant to divest his stake in SHT upon listing. There in a letter from the defendant to the plaintiff dated 25 March 1999 (see p. 188 CBDA) which shows there was a meeting between the plaintiff and the defendant. Following from that meeting the defendant paid the plaintiff RM250,000 towards part payment of the accrued interest.

[24] The other contemporary document is a facsimile copy from the defendant's brother and legal advsior, Encik Mohd Nasrim Mohd Salleh to the plaintiff dated 17 April 1999 (p. 189 CBDA) stating that the defendant has had numerous meetings with the vendors of the shares on an arrangement to buy back the shares. In fact an agreement was signed between the defendant and Encik Chong Hin Loon, where a cheque was to be given to the defendant who then would deliver the same to the plaintiff.

[25] There is also a letter from the defendant to the plaintiff dated 10 May 1999 (pp. 190-191 CBDA) where the defendant proposed a scheme of arrangement towards repayment and settlement of the amount owing. The proposal caters for both situations where BEW was not listed and another option if BEW was listed.

[26] Other documents include a letter from the plaintiff to the defendant dated 19 May 1999 (pp. 192-193 CBDA) regarding the defendant's proposal for repayment. Another letter from the plaintiff to the defendant dated 3 June 1999 (pp. 94-195 CBDA) regarding the defendant's proposal for repayment. A series of letters from the plaintiff to the defendant dated 22 September 1999, 10 December 1999, 14 January 2000, 31 January 2000 (see pp. 196-197, 200-201, 202-203 and 2006 of CBDA) regarding the defendant's proposal for repayment. Further letters from the defendant to the plaintiff dated 4 October 1999, 31 January 2000, 18 February 2000, 23 February 2000 (pp. 198-199, 205, 207 and 208-209 of CBDA) discussing proposals for repayment. There is acknowledgement of receipt of Cheque No. 872827 for RM100,000 (p. 204 CBDA) for overdue interest under the loan paid by the defendant. These documents are too overbearing to be ignored and they are wholly inconsistent with any allegation of representation alleged by the defendant. The relevance of these form of evidence was taken into account in the Supreme Court case of *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarlous George Fernandez & Anor & Another Case* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50. The Supreme Court viewed that these contemporaneous documents are relevant in a commercial transaction.

[27] It is amply clear, the defendant's contention that oral representations were made to him by the plaintiff's officers is highly improbable. Furthermore, the evidence adduced by and on behalf of the defendant is not admissible for reasons that it cannot be admitted under s. 92 of Evidence Act, it is also not admissible due to the entire agreement clause, and the evidence went against the very conduct of the defendant himself. Clearly, the defendant has failed to establish the existence of any collateral agreement which co-existed with the written agreements, to absolve his liability.

[28] Based on the foregoing I hereby allow the claim of the plaintiff in both suit 1248 and suit 1249 as per the respective statement of claims. Consequently, I hereby dismiss the counter claims of the defendant in both actions with costs.